United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

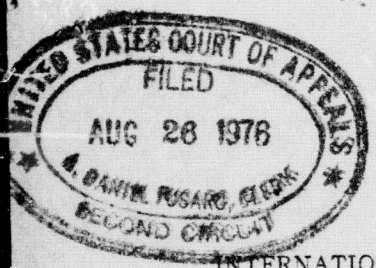
8-26

ORIGINAL

76-7208, 7211

To be argued by
VICTOR S. CICHANOWICZ

United States Court of Appeals
FOR THE SECOND CIRCUIT



BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF EGAN OLDENDORF AS APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF EGAN OLDENDORF AS APPELLEE

The Scope of this Brief

The purpose of this brief is to deal with the contention set forth in the brief of International Terminal Operating Co., Inc. as appellant, where it urges in Point I thereof that the Trial Court was in error in granting indemnity to the shipowner. This Point will be moot if this Court agrees with the shipowner that the record is without proof of negligence to support the jury verdict which has been entered against the shipowner.

POINT I

The stevedore's liability for breach of warranty of workmanlike service arises out of the stevedore's contractual obligation to the shipowner and does not rest on the nature of the shipowner's liability.

The contention that a stevedore's warranty of workmanlike service can be invoked in favor of a shipowner only if the shipowner is held liable for unseaworthiness, is totally lacking in merit and not in accord with the decisions of this Court or those of the United States Supreme Court. The fundamental precept of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) is that the right of indemnity is totally unrelated to and not dependent on the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman. In that case the Court said at page 134:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the

cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

In *Weyerhaeuser S.S. Co.* v. *Nacirema*, 355 U.S. 563 (1958) where the jury found for the injured longshoreman on the issue of negligence and for the shipowner on the issue of seaworthiness, the Court noted at page 569:

"* * *. In the area of contractual indemnity an application of the series of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Co., supra* (350 U.S. at 132, 133)."

In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) the Supreme Court said at page 752:

"[R]ecovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and the stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary. *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., supra.*"

In *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (2 Cir., 1962) which appellant I.T.O. cites in support of its contention, the Court said at page 424:

"Whether a hazard is created by the negligence of the shipowner or otherwise, the stevedoring firm is liable for indemnity if a workmanlike performance would have eliminated the risk of injury."

In *Henry* v. *A/S Ocean*, 512 F.2d 401 (2 Cir. 1975) this Court after reiterating that the stevedore's liability for breach of warranty does not rest upon the nature of the

shipowner's liability, but upon the stevedore's own contractual obligation to the shipowner, stated at page 406:

> "Where the shipowner's liability for violation of his non-delegable duties, whether cognizable under a theory of unseaworthiness or of negligence, is attributable to the stevedore's action or inaction in breach of his contractual obligation, the recovery of indemnity should not turn on the particular theory selected by the plaintiff as the basis of his suit against the shipowner.
>
> "Tort principles have no application to an indemnity claim, even though the stevedore's breach depends on whether he 'rendered a substandard performance.' *Ryan Stevedoring Co., supra*, 350 U.S. at 134, 76 S.Ct. 232, 100 L.Ed. 133. The tort law concept that there shall be no contribution among joint tortfeasors therefore becomes irrelevant, and as *Weyerhaeuser* implied, indemnity may be awarded even though both stevedore and shipowner are in some sense 'at fault'."

Nor is this Court's decision in *Henry* v. *A/S Ocean, supra*, distinguishable because "the shipowner's conduct in that case was 'quite passive', whereas the stevedore's conduct was active and primary" as I.T.O.'s brief intimates at pages 13 and 14.

In *Henry* v. *A/S Ocean* this Court after noting that shipowner negligence does not preclude indemnity, said at page 407:

> "The shipowner's own conduct will preclude it from obtaining indemnity from the stevedore *only* where it prevented or seriously handicapped the stevedore in his effort to perform his duties." (Emphasis supplied)

Thus the shipowner's right to indemnity does not depend on whether the shipowner was negligent or not but on whether its conduct, whether characterized as negligent or otherwise, prevented or seriously handicapped the stevedore in rendering a workmanlike service.

I.T.O.'s reliance on this Court's decision in *Schwartz* v. *Compagnie Generale Transatlantique*, 405 F.2d 270 (2 Cir. 1968) and *Fairmont Shipping Corp.* v. *Chevron International Oil Company, Inc.*, 511 F.2d 1252 (2 Cir. 1975) is misplaced. As this Court pointed out in *Henry* v. *A/S Ocean, supra,* 512 F.2d at page 407, footnote [3], the *Schwartz* case is clearly distinguishable and dealt solely with the question of whether the relationship between the shipowner and the proposed indemnitor, the United States Government, permitted the implication of a warranty of workmanlike service. In *Fairmont Shipping Corp.* v. *Chevron International Oil Company, supra,* this Court at page 1260 of 511 F.2d however reaffirmed that a fault of a shipowner unless it prevented or seriously handicapped the stevedore in his ability to do a workmanlike job, did not relieve the stevedore of his duty under the warranty.

While the trial court did predicate the allowance of indemnity against I.T.O. because of the jury's finding of 15% contributory negligence on the part of the plaintiff longshoreman on the basis of this Court's decision in *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 527 F.2d 1282 (2 Cir. 1975), cert. den. 48 L.Ed. 2d 195 (1976), I.T.O. was not otherwise an innocent bystander saddled with a vicarious liability for an occurrence which it did not have an opportunity to prevent. The signalman employed by I.T.O. acted as the eyes of the Hoffman crane operator (49a, 78a). Since the crane operator could not see into the hold, it was the function of the signalman by means of hand signals to indicate when to raise the draft, when to top the boom, when to stop, etc. (48a-50a, 80-83a). When the crane operator continued to top the boom without any signal from the signalman, the signalman stood by and watched as the draft was dragged across the cargo and did nothing to stop the movement of the draft until he heard hollering from the hatch after the beam was struck and had fallen on plaintiff (100a, 102a). It was also this same I.T.O. signal-

man who claimed in his testimony that when he looked down into the hold before discharging commenced, he saw that there were no lashings, chocks, or dunnage (52a). As this Court pointed out in *Hartnett* v. *Reiss Steamship Company,* 421 F.2d 1011, 1018 (2 Cir. 1970), under such circumstances even if there was a temptation to re-examine prior holdings, such facts do not warrant a re-examination. Since I.T.O. continued the stevedoring operation with full knowledge of the alleged condition of the hatch, it was guilty of the very conduct which it claims distinguishes the *Henry* v. *A/S Ocean, supra* case from this case.

Conclusion

If the jury's finding of negligence on the part of the shipowner should be sustained the judgment awarding indemnity to the shipowner from I.T.O. and Hoffman should also be sustained. In any event, the shipowner should be awarded its costs of defense including reasonable counsel fees.

Respectfully submitted,

CICHANOWICZ & CALLAN
Attorneys for Defendant and Third-Party Plaintiff Egan Oldendorf as Appellee.

VICTOR S. CICHANOWICZ
Of Counsel

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 26th day of AUGUST, 1976

Attorney for APPELLANT

COPY RECEIVED
AUG 26 1976
Lisa Bank

DI COSTANZO, KLONSKY & CUTRONA, P.C.
ATTORNEYS FOR PLAINTIFF-APPELLEE

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AUG 26 1976

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